

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JAN 15 2004

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

DANIEL R. AUTERY, and RITA  
ANN AUTERY, husband and wife;  
et al,

Plaintiffs,

v.

UNITED STATES OF AMERICA, by  
and through the DEPARTMENT OF  
ENERGY and THE UNITED STATES  
DEPARTMENT OF THE INTERIOR  
FISH AND WILDLIFE SERVICE,

Defendant.

NO. CT-02-5113-EFS

**ORDER GRANTING THE UNITED  
STATES' MOTION TO  
DISMISS/SUMMARY JUDGMENT IN  
REGARDS TO INDEPENDENT  
CONTRACTOR AND DISCRETIONARY  
FUNCTION AND RULING ON OTHER  
MOTIONS**

A hearing was held in the above-captioned on January 9, 2004. Robert Dunn, Jay Flynn, Thomas Wolfe appeared on behalf of the Plaintiffs, while James Shively and Rolf Tangvold appeared on the behalf of the United States. Before the Court were (1) USA's Motion to Dismiss for Lack of Subject Matter Jurisdiction Pursuant to Federal Rule of Civil Procedure 12(b)(1) or in the Alternative Motion for Summary Judgment, (Ct. Rec. 56), (2) Plaintiffs' Motion for Partial Summary Judgment Regarding Discretionary Function Affirmative Defense, (Ct. Rec. 64), (3) USA's Motion to Dismiss for Lack of Duty, Failure to File a Proper Administrative Claim, Unauthorized Representation, and Lack of Subject

1 Matter Jurisdiction, (Ct. Rec. 86), and (4) Plaintiffs' Motion for  
2 Partial Summary Judgment Re: Affirmative Defenses: (1) Failure to State  
3 a Claim, (2) Wrongful Act by Government, (7) Act of God, and (9)  
4 Administrative Claim, (Ct. Rec. 67). After reviewing the submitted  
5 material and applicable statutory and case law and hearing oral argument,  
6 the Court is fully informed. On the major issue before the Court, the  
7 Court grants the United States' motion to dismiss/summary judgment for  
8 lack of subject matter jurisdiction finding that the independent  
9 contractor exception applies, or alternatively, the discretionary  
10 function exception applies. Rulings on other issues also follow.

#### 11 I. BACKGROUND

12 On June 27, 2000, at approximately 1:20 p.m., a fire started as a  
13 result of a fatal automobile accident at Milepost 36 on State Route  
14 ("SR") 24, near the Hanford Reservation in Washington.<sup>1</sup> The fire began  
15 within the State of Washington's easement boundaries and spread to the  
16 Fitzner-Eberhardt Arid Lands Ecology Reserve ("ALE"),<sup>2</sup> and then  
17 ultimately to private land. The Hanford Fire Department ("HFD"), which  
18 was a subdivision of DynCorp Tri-Cities Services, Inc., took incident  
19 command and dispatched equipment and personnel to fight the fire.

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21 <sup>1</sup> The Hanford Reservation is a 587-square-mile property owned by  
22 the United States Department of Energy ("DOE"). (Klein Decl. ¶ 3.)

23 <sup>2</sup> A portion of the Hanford Site is known as the Fitzner-Eberhardt  
24 Arid Lands Ecology Reserve ("ALE"). (Klein Decl. ¶ 3.) The ALE is a 120-  
25 square-mile area that lies on the western side of the Hanford Site and  
26 has been designated as a wildlife refuge and research area. *Id.*

1 Incident command was relinquished to the Tri-County Incident Management  
2 Team at midnight, June 27, 2000. By the time the fire was contained on  
3 July 1, 2000, it had burned nearly 164,000 acres, forty homes, and  
4 outbuildings. In addition to the property damage, individuals may have  
5 died as a result of the stress induced by the fire, smoke, and property  
6 damage.

## 7 **II. SUBJECT MATTER JURISDICTION**

8 In this suit, Plaintiffs claim that the United States negligently  
9 failed to maintain firebreaks and allowed fire to trespass onto  
10 Plaintiffs' property.<sup>3</sup> The Government contends that this Court lacks  
11 subject matter jurisdiction because the independent contractor exception  
12 and/or the discretionary function exception to the Federal Tort Claims  
13 Act apply.

### 14 **A. Standard**

15 There are two types of motions to dismiss to challenge subject  
16 matter jurisdiction: facial and factual challenges. A facial attack is  
17 based on the allegations in the Complaint, together with documents  
18 attached to the Complaint, judicially noticed facts, and undisputed facts  
19 in the record. *Thornhill Publishing Co. v. Gen. Tel & Elect.*, 594 F.2d

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20  
21 <sup>3</sup> The failures that Plaintiffs point to are that the Department of  
22 Energy ("DOE") (1) did not remove barbed-wire from its fences that catch  
23 tumbleweeds, (2) did not mow the right of ways, (3) did not apply a  
24 herbicide or chemicals on either side of the ALE fence lines, (4) did not  
25 burn in February, March, or April 2000, (5) did not mulch, (6) did not  
26 use surfactant, and (7) did not budget for such activities.

1 730, 733 (9th Cir. 1979). A factual attack to subject matter  
2 jurisdiction is based on extrinsic evidence apart from the pleadings.  
3 *Gould Elects., Inc. v. United States*, 220 F.3d 169, 176 (3d Cir. 2000).  
4 Where the jurisdictional issues and substantive issues are so intertwined  
5 that the question of jurisdiction is dependent upon the resolution of  
6 factual issues going to the merits, the court should consider the motion  
7 under the standards for summary judgment. *Machlan v. Bell*, 261 F.3d 908,  
8 909 (9th Cir. 2001).

9 The Court finds that the jurisdictional issues and substantive  
10 issues before it are so intertwined that the question of jurisdiction is  
11 dependent upon the resolution of factual issues going to the merits.  
12 Accordingly, the Court reviews the motions under the standard for summary  
13 judgment.

14 A party is entitled to summary judgment where the documentary  
15 evidence produced by the parties permits only one conclusion. *Anderson*  
16 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The party seeking  
17 summary judgment must show that there is an absence of disputed issues  
18 of material fact and that he is entitled to judgment as a matter of law.  
19 FED. R. CIV. PROC. 56(c). In other words, the moving party has the burden  
20 of showing that no reasonable trier of fact could find other than for the  
21 moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). "A  
22 material issue of fact is one that affects the outcome of the litigation  
23 and requires a trial to resolve the parties' differing versions of the  
24 truth." *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982).  
25 The court is to view the facts and draw inferences in the manner most  
26

1 favorable to the non-moving party. *Anderson*, 477 U.S. at 255; *Chaffin*  
2 *v. United States*, 176 F.3d 1208, 1213 (9th Cir. 1999).

3 However, a burden is also on the party opposing summary judgment to  
4 provide sufficient evidence supporting his claims to establish a genuine  
5 issue of material fact for trial. *Anderson*, 477 U.S. at 252; *Chaffin*, 186  
6 F.3d at 1213. "[A] mere 'scintilla' of evidence will be insufficient to  
7 defeat a properly supported motion for summary judgment; instead, the  
8 non[-]moving party must introduce some 'significant probative evidence  
9 tending to support the complaint.'" *Fazio v. City & County of San*  
10 *Francisco*, 125 F.3d 1328, 1331 (9th Cir. 1997) (quoting *Anderson*, 477  
11 U.S. at 249, 252, 106 S. Ct. 2505).

#### 12 **B. Federal Jurisdiction**

13 Federal courts are courts of limited jurisdiction; as such, they are  
14 empowered to hear only those cases that are within the judicial power of  
15 the United States as defined by the United States Constitution and those  
16 cases that have been authorized by Congress. *Mendoza v. Zirkle Fruit*  
17 *Co.*, 301 F.3d 1163, 1174 (9th Cir. 2002); *Estate of Branson v. Comm'r of*  
18 *Internal Rev.*, 264 F.3d 904, 908 (9th Cir. 2001). As a result of these  
19 limits, the party initiating the suit in federal court must affirmatively  
20 allege facts in the complaint to show that the federal court has  
21 jurisdiction to hear the case. *Fifty Assocs. v. Prudential Ins. Co.*, 446  
22 F.2d 1187, 1189 (9th Cir. 1970). Federal courts generally lack the  
23 authority to consider and grant relief against the United States, unless  
24 Congress explicitly waives sovereign immunity. Congress provided a  
25 limited waiver of immunity under the Federal Tort Claim Act ("FTCA") for  
26 any claim founded on negligence of an employee of the United States. 28

1 U.S.C. § 1346, 2671 & § 2674.<sup>4</sup> However, Congress did not waive immunity  
2 when the actions complained of were performed by individuals who were not  
3 "employees of the government" but rather were employees of a "contractor  
4 with the United States," 28 U.S.C. § 2671, or (2) when the action  
5 complained of was the result of a discretionary function on the part of  
6 a federal agency or an employee of the government, 28 U.S.C. § 2680(a).  
7 If immunity is waived under the FTCA, then the United States is liable  
8 if the employee's conduct would be a violation of "the law of the place  
9 where the act or omission occurred." 28 U.S.C. § 1346(b)(1).

#### 10 **C. Independent Contractor Exception**

11 The United States argues that Plaintiffs' tort action for (1)  
12 failure to maintain firebreaks on its property and (2) negligently  
13 fighting the fire is barred by the independent contractor exception to  
14 the FTCA because individuals other than employees of the United States  
15 were responsible for the alleged wrongdoings. Plaintiffs contend that  
16 the United States did not delegate or contract away its duty to create  
17 and maintain firebreaks.

18 Federal law is used to determine if an entity or individual is a  
19 federal employee or an independent contractor. *Hines v. United States*,  
20 60 F.3d 1442, 1447 (9th Cir.1995). The FTCA defines "employee of the  
21 government" as including "officers or employees of any federal agency .  
22

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23 <sup>4</sup> 28 U.S.C. § 2674 sets forth, "[t]he United States shall be  
24 liable, respecting the provisions of this title relating to tort claims,  
25 in the same manner and to the same extent as a private individual under  
26 like circumstances . . . ."

1 . . ." 28 U.S.C. § 2671. A federal agency is defined as ". . .  
2 executive departments, the judicial and legislative branches, the  
3 military departments, independent establishments of the United States,  
4 and corporations primarily acting as instrumentalities or agencies of the  
5 United States, but does not include any contractor with the United  
6 States." 28 U.S.C. § 2671. One is not a government employee simply  
7 because they are performing tasks that would otherwise be performed by  
8 salaried employees of the government. *Logue v. United States*, 412 U.S.  
9 521, 531-32 (1973). In addition, the fact that a contractor is completely  
10 funded by the United States is immaterial to the determination because  
11 the focus is on day-to-day control. *United States v. Orleans*, 425 U.S. 807  
12 (1976).

13 However, if the United States maintains too much control over the  
14 contractor, so that the United States effectively supervised the day-to-  
15 day operations of the contractor, then the contractor is no longer  
16 independent, and is in fact an employee. Yet, simply because the  
17 government inspects the contractor's work is insufficient; rather there  
18 must be "substantial supervision over the day-to-day operations." *Letnes*  
19 *v. United States*, 820 F.2d 1517, 1519 (9th Cir. 1987); *Hines v. United*  
20 *States*, 60 F.3d 1442, 1447 (9th Cir. 1995).

21 The Tenth Circuit has developed a multi-factor test to assist in the  
22 analysis of the independent contractor exception to the waiver of  
23 sovereign immunity: (1) the intent of the parties as manifested in their  
24 agreement, (2) the extent of the control retained by the United States,  
25 (3) who owns the tools and vehicles, (4) who is responsible for providing  
26 liability insurance for the contractor, (5) whether the contractor pays

1 self-employment social security tax or the United States withholds income  
2 tax payments, (6) whether federal regulations prohibit federal employees  
3 from performing such contracts, and (7) whether the contractor has the  
4 authority to subcontract work to others. *Norton v. Murphy*, 661 F.2d 882,  
5 885 (10th Cir. 1970).

6 Initially, the Court notes that neither party has brought to the  
7 Court's attention, nor has the Court found on its own inquiry, a federal  
8 regulation which prohibits federal employees from performing such  
9 contracts. Second, Plaintiffs have not contested that the tools and  
10 vehicles used by the Hanford Fire Department ("HFD") were owned by  
11 DynCorp/HFD, that the persons doing the work were employees of HFD, or  
12 that HFD set the employees' work hours and wages. Further, Fluor was  
13 allowed to and did hire DynCorp/HFD to assist in fulfilling its  
14 obligations under the contract. The Court finds that these factors weigh  
15 in favor of a finding that the independent contractor exception applies.  
16 Yet, vital to the overall analysis is the intent of the parties as  
17 manifested in their written agreements and the amount of control retained  
18 by the United States.

19 After reviewing the contracts in place at the time of the fire, the  
20 Court finds that DOE clearly contracted out fire prevention and fire  
21 fighting responsibilities. First, DOE contracted with Fluor for all  
22 emergency services on the Hanford site; these services included fire  
23 protection and suppression as well as fire fighting.<sup>5</sup> Fluor

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25 <sup>5</sup> The contract between DOE and Fluor, called the "Project Hanford  
26 Management Contract," provided in part, "[t]he Contractor shall furnish



1 subcontracted with DynCorp.<sup>6</sup> HFD was a part of DynCorp and had the duty

2 \_\_\_\_\_  
3 all personnel, facilities, equipment, material, supplies, and services  
4 (except as expressly set forth in this contract as furnished by the  
5 Government) and otherwise do all things necessary for, or incident to,  
6 performing in an efficient and effective manner all work set forth in  
7 Section C." (§ B.1.) Section C, entitled "Statement of Work," provided:

8 Contractor shall be responsible for planning, integrating,  
9 managing, and executing its projects, services, and other  
10 activities at the Hanford Site as described in the Contract.  
11 . . and shall furnish, or cause to be furnished, all personnel,  
12 facilities, equipment, material, supplies, and services (except  
13 as may be expressly set forth in this contract as furnished by  
the Government), and otherwise do all things necessary for, or  
incident to, providing its best efforts so as to carry out in  
an efficient and effective manner all necessary work set forth  
in this Contract."

14 Fluor Contract § C.1. Also, under the contract, Fluor was responsible  
15 for providing technical and administrative emergency management services.

16 <sup>6</sup> In Subcontract No. 80232764-9-K006, DynCorp agreed to assist  
17 Fluor with "planning, managing, integrating, operating, and implementing  
18 a full range, or designated portions thereof, of Hanford Site's programs,  
19 projects, and other activities as set forth in this Subcontract."

20 Subcontract § 2.0. Subsection F of this subcontract pertained to  
21 "Emergency Services" and provided:

22 The Subcontractor shall be responsible for Emergency  
23 Services including:

- 24 1. Fire Protection Engineering
- 25 2. Fire Department Emergency Response, including:
  - 26 a. Fire Suppression
  - b. Rescue
  - c. Emergency medical/Ambulance
  - d. Hazardous Material Spill Response.

1 to carry out the contractual duties regarding fire protection,  
2 suppression, and fire fighting. In furtherance of these duties, HFD was  
3 to utilize the February 1993 Arid Lands Ecology ("ALE") Facility  
4 Management Plan prepared by Batelle another contractor. The 1993 Plan  
5 was a guide to be followed by the ALE facility manager. The decision to  
6 change the management of the ALE to Fish and Wildlife Service ("FWS"),<sup>7</sup>  
7 also a government agency, did not reinsert the Government in the day-to-  
8 day management of the fire protection, firefighting, fire suppression  
9 duties regarding the ALE because the FWS continued to use the 1993 Plan  
10 and FWS contracted with HFD to provide the "scope" of services explicitly  
11 stated in the MOU.<sup>8</sup>

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- 13 e. Incident Command  
14 3. Fire Protection System Inspection and maintenance  
15 4. Fire Prevention  
16 . . .

17 <sup>7</sup> In 1997, DOE entered into an agreement with the United States  
18 Fish and Wildlife Service ("FWS") whereby FWS was given a use permit for  
19 the ALE for the purpose of operating the ALE as a Research Natural Area.  
20 Accompanying this Permit was a Memorandum of Understanding dated June 20,  
21 1997. This MOU provided that the "FWS will assume the management of the  
22 ALE."

23 <sup>8</sup> The FWS entered into a Cooperative Agreement on September 14,  
24 1998 with HFD. The purpose of the Cooperative Agreement was for HFD to  
25 "provide fire protection and wildfire suppression for the [FWS] managed  
26 lands located within the Hanford Site boundaries in Benton County,  
Washington." (§ 1.)

1 Furthermore, the Court finds that the United States did not retain  
2 substantial control over the day-to-day operations. Craig Christenson  
3 has held the position of Fire Protection Engineer for DOE since 1992.  
4 (Christenson Decl. p. 7.) In this position, he wrote reports, reviewed  
5 contractors' assessments, did assessments, reviewed safety analysis  
6 reports, and advised management of the fire protection program at the  
7 Hanford site. (Christenson Decl. p. 7.) Mr. Christenson also attended  
8 meetings regarding fire protection and firefighting programs. Mr.  
9 Christenson did not "hands-on" participate nor direct the parties on a  
10 day-to-day basis as to how the fire prevention was to be achieved.  
11 Therefore, DOE's involvement did not rise to the level of substantial  
12 day-to-day involvement as is required.

13 For the reasons given above, the Court finds that, after reviewing  
14 the record before it, DOE contracted out the fire prevention and  
15 suppression responsibilities. Accordingly, the independent contractor  
16 exception applies, and the Court does not have jurisdiction over the  
17 United States in regards to fire protection and fire suppression claims.

18 **D. Discretionary Function Exception**

19 The discretionary function exception, created by 28 U.S.C. §  
20 2680(a), bars, "[a]ny claim . . . based upon the exercise or performance  
21 or the failure to exercise or perform a discretionary function or duty  
22 on the part of a federal agency or an employee of the Government, whether  
23 or not the discretion involved be abused." The burden of showing the  
24 applicability of this exception lies with the United States. *Reed v.*  
25 *United States Dep't of the Interior*, 231 F.3d 501, 503 (9th Cir. 2000).  
26 The purpose of the exception is to "prevent judicial 'second-guessing'

1 of legislative and administrative decisions grounded in social, economic,  
2 and political policy through the medium of an act of tort." *United States*  
3 *v. Gaubert*, 499 U.S. 315, 323 (1991) (citing *United States v. Varig*  
4 *Airlines*, 467 U.S. 494, 813 (1984)).

5 The United States Supreme Court created a two-pronged test to  
6 determine whether the exception applies. *Id.*; *Berkovitz v. United*  
7 *States*, 486 U.S. 531 (1988). First, the exception applies if the  
8 district court determines that the allegedly negligent or wrongful act  
9 of a federal employee involved "an element of judgment or choice," i.e.  
10 it is discretionary. *Berkovitz*, 486 U.S. at 536; *Gaubert*, 499 U.S. at  
11 323. Second, in order for the exception to apply, the court must  
12 determine that the discretionary conduct at issue is "susceptible" to  
13 policy analysis; in other words, the judgment is the type of conduct the  
14 exception is designed to shield. *Berkovitz*, 486 U.S. at 536; *Gaubert*,  
15 499 U.S. at 323. "The focus of the inquiry is not on the agent's  
16 subjective intent in exercising the discretion conferred by statute or  
17 regulation, but on the nature of the actions taken and on whether they  
18 are susceptible of policy analysis." *Id.* at 325. Accordingly, the  
19 discretionary function exception does not apply when a federal statute,  
20 regulation, or policy prescribes a course of specific conduct for an  
21 employee to follow. *Berkovitz*, 486 U.S. at 536. In addition, budget  
22 constraints are insufficient by itself to make an activity a  
23 discretionary function for purposes of the FTCA. *ARA Leisure Servs. v.*  
24 *United States*, 831 F.2d 193, 195-96 (9th Cir. 1987).

25 Plaintiffs have pointed to no federal statute or regulation  
26 mandating federal action. Rather, Plaintiffs argue that the 1993 ALE

1 Plan was a policy formulated by the government which eliminated the DOE's  
2 discretion in maintaining firebreaks.

3 After reviewing the record before it, the Court rules that the  
4 decision of whether or not to maintain firebreaks, what method to use if  
5 firebreaks are done, e.g. via controlled burns, mowing, discing, or  
6 spraying, and where is a discretionary decision. The 1993 Plan did not  
7 impose any mandatory duties upon federal employees or its contractors.  
8 The Plan states it is setting out "[t]he preferred management  
9 alternative" for the ALE, and that the "ALE facility manager will use  
10 this plan to guide decisions on managing the [ALE]." Plaintiffs  
11 highlight that the Plan also states that "[t]he DOE retains final  
12 authority over all decisions, policies, and operations regarding ALE Site  
13 management." However, the 1993 Plan also stated, "The views and opinions  
14 of authors expressed herein do not necessarily state or reflect those of  
15 the United States Government or any agency thereof." In addition, it  
16 provides, "Neither the United States Government nor any agency thereof,  
17 nor Battelle Memorial Institute, nor any of their employees, makes any  
18 warranty, express or implied, or assumes any legal liability or  
19 responsibility for the accuracy, completeness, or usefulness of any  
20 information, apparatus, product or process disclosed, or represents that  
21 its use would not infringe privately owned rights." The Court finds that  
22 these statements together demonstrate that the 1993 Plan was intended  
23 merely to guide management issues on the ALE, and did not establish  
24 binding federal policy.

25 Accordingly, even if the MOU between DOE and FWS were to be  
26 construed as assigning no duties to HFD regarding fire protection and

1 fire suppression, the Court finds that subject matter jurisdiction is  
2 lacking because the decisions of whether, how, and where to maintain  
3 firebreaks involve elements of judgment and choice and these decisions  
4 are susceptible to policy analysis.

5 **III. REMAINING ISSUES: DUTY AND AFFIRMATIVE DEFENSES**

6 Also, before the Court, was the issue of whether the United States  
7 had a duty under Washington law to undertake fire prevention activities.  
8 The Court declines to rule on this question in light of its finding that  
9 the Court lacks jurisdiction under the Federal Tort Claims Act.

10 In addition, the Court does not rule on Plaintiffs' motion as it  
11 pertains to the Act of God Affirmative Defense. During oral argument,  
12 Plaintiffs did not object to the United States' request that ruling on  
13 such motion be continued until after the parties had an opportunity to  
14 conduct discovery into proximate causation. For administrative reasons,  
15 the Court denies the motion with right to renew following discovery.

16 Also, at the hearing, the parties informed the Court that agreements  
17 had been reached in regards to the Affirmative Defense of Failure to File  
18 a Proper Administrative Claim. The United States no longer contests  
19 Plaintiffs' counsel's ability to pursue the litigation on the Plaintiffs'  
20 behalf. The Plaintiffs agreed that their requests for pre-judgment  
21 interest and attorneys' fees, in part, are limited by the FTCA. On the  
22 remaining issue regarding the Plaintiffs' administrative damages claim,  
23 the Court finds the language "not less than" in the administrative claim  
24 surplusage and thus strikes that phrase, finding that the listed monetary  
25 amount is the sum certain. See *Bradley v. United States*, 951F.2d 268, 271  
26 (10th Cir. 1991).

For the reasons given above, **IT IS HEREBY ORDERED:**

1. USA's Motion to Dismiss for Lack of Subject Matter Jurisdiction Pursuant to Federal Rule of Civil Procedure 12(b)(1) or in the Alternative Motion for Summary Judgment, **(Ct. Rec. 56)**, is **GRANTED**.

2. The Plaintiffs' Motion for Partial Summary Judgment Regarding Discretionary Function Affirmative Defense, **(Ct. Rec. 64)**, is **DENIED**.

3. USA's Motion to Dismiss for Lack of Duty, Failure to File a Proper Administrative Claim, Unauthorized Representation, and Lack of Subject Matter Jurisdiction, **(Ct. Rec. 86)**, is **GRANTED IN PART, DENIED IN PART (with right to renew), AND ABSTAINED IN PART**.

4. Plaintiffs' Motion for Partial Summary Judgment Re: Affirmative Defenses: (1) Failure to State a Claim, (2) Wrongful Act by Government, (7) Act of God, and (9) Administrative Claim, **(Ct. Rec. 67)**, is **DENIED IN PART, ABSTAINED IN PART, AND GRANTED IN PART**.

**IT IS SO ORDERED.** The District Court Executive is directed to

(1) Enter this Order,

(2) Provide copies to counsel,

(3) Enter Judgment in favor of the Defendants on the grounds that the Court does not have subject matter jurisdiction under the Federal Tort Claims Act, and

(4) Close this file, subject to reopening for good cause shown.

**DATED** this 15<sup>th</sup> day of January, 2004.



EDWARD F. SHEA  
United States District Judge

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